

**THE NATIONAL COMPANY LAW TRIBUNAL  
PRINCIPAL BENCH  
AT NEW DELHI**

**Company Petition No. (IB)-626(PB)/2019**

**Under Section 7 of the Insolvency and Bankruptcy  
Code, 2016**

In the matter of:

Mrs. Ruby Kumari

.... Applicants/ Financial Creditor

Vs.

M/s Krishna Assets Developers Private Limited

.....Respondents/ Corporate Debtor

***Judgment delivered on: 24.09.2019***

**CORAM:**

**MR. CHIEF JUSTICE (RTD.) M. M. KUMAR HON'BLE PRESIDENT**

**MR. S. K. MOHAPATRA, MEMBER (TECHNICAL)**

For Applicant:

Mr. Sanket Gupta, Advocate.

For Respondent:

None



## ORDER

**S. K. Mohapatra, Member**

1. Mrs. Ruby Kumari, applicant financial creditor has filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent, M/s. Krishna Assets Developers Private Limited, referred to as the corporate debtor.
2. The Respondent company M/s. Krishna Assets Developers Private Limited (CIN No. U70100 DL2012 PTC 243255) against whom initiation of Corporate Insolvency Resolution Process has been prayed for, was incorporated on 08.10.2012 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at 391, Haveli Haider Kuli, Chandni Chowk, Delhi – 110006. Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal having territorial jurisdiction over the place is the Adjudicating Authority in

relation to the prayer for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor under sub-section (1) of Section 60 of the Code.

3. The precise case of the applicant is that in the month of October, 2015, the corporate debtor, through its Directors, approached her to invest in the project namely '3 Dimension' situated at Village Noor Nagar, Raj Nagar Extension, Uttar Pradesh.
4. Believing upon the presentation by the directors of the corporate debtor, applicant made an initial payment of Rs. 1,00,000/- via cheque number 002766 dated 16.10.2015 drawn on Allahabad Bank to the respondent for booking an under-construction flat in their project "3 Dimension".
5. Subsequently the financial creditor made a further payment of Rs. 3,50,000/- for booking the under-construction flat in the project "3Dimension", there by the total amount paid was Rs. 4,50,000/-.
6. Copy of cheques and receipts have been placed on record to show that a total sum of Rs. 4,50,000/- was disbursed to the respondent as per the following details:

- I. Rs. 1,00,000/- via cheque number 002766 dated 16.10.2015 drawn on Allahabad Bank.
- II. Rs. 1,00,000/- vide Cheque No. 002767 dated 05.11.2015 drawn on Allahabad Bank, Khasra No. 368, Near Bus Stand, Khera, Najafgarh, New Delhi – 110043.
- III. Rs. 1,50,000/- vide Cheque No. 002768 Dated 02/12/2015 drawn on Allahabad Bank, Khasra No. 368, Near Bus Stand, Khera, Najafgarh, New Delhi — 110043.
- IV. Rs. 1,00,000/- vide Cheque No. 002777 Dated 27/04/2016 drawn on Allahabad Bank, Khasra No. 368, Near Bus Stand, Khera, Najafgarh, New Delhi — 110043.

7. Thereafter an Apartment Buyer's Agreement dated 22.05.2016 was executed between the financial creditor and the respondent Corporate Debtor and booked a Residential unit bearing no. 101, with Super Area admeasuring 136.10 sq mtr. (1465 Sq. Ft.), vide Allotment Agreement dated 22/05/2016 against the total sale consideration of Rs. 55,21,203/-.



- 8.** It has been submitted that for the booking of the aforesaid unit, financial creditor has paid a total sum of Rs. 4,50,000/- (Rupees Four Lacs Fifty Thousand Only) to the corporate debtor. It is submitted that the corporate debtor miserably failed to execute the contract, though the possession of the unit was normally to be delivered within 36 months.
- 9.** The petitioner has alleged in the application that '*no building construction work is going on and is stopped as on date. It is also submitted that financial creditor has not received any communication from the corporate debtor*'. The petitioner has placed photographs of the actual site with the contention that no construction work is going as on date and it has stopped since last many months.
- 10.** It is further contended that despite reminder and legal notice dated 13.08.2018, no reply has been received from the respondent Corporate Debtor. As the Corporate Debtor has stopped the project and has not paid the dues to the Financial Creditor, it is prayed for initiation of corporate insolvency resolution process against the respondent company by admitting the present application.

- 11.** As per part IV of the application it is claimed that a sum of Rs. 9,02,250/- (Rupees Nine Lakhs Two Thousand Two Hundred and Fifty Only) is due from the respondent company including interest as on 31.01.2019.
- 12.** It is seen from the case records that service could not be effected on the registered address of the respondent nor could the service be successfully effected through email, as the email also bounced back. Accordingly, direction was issued on 27.03.2019 to make substituted service in accordance with the provisions of Rule 38 of the NCLT Rules, 2016 read with Order V Rule 20 of CPC. In response to the substituted service taken out by the petitioner, learned counsel for the respondent appeared on 02.05.2019. The respondent was directed to deposit a sum of Rs. 20,000/- in the account of the applicant in lieu of the expenses for the substituted service and was also directed to file reply within 10 days.
- 13.** However, respondent preferred neither to pay cost nor to file reply and even did not put in appearance on 22.05.2019. Accordingly, respondent was proceeded *ex-parte*. On the next two dates of hearing no one appeared on behalf

of the respondent. Consequently, the arguments of the petitioner were heard in the absence of respondent and the matter was reserved for orders. As the matter was uncontested, the contentions and the documents relied upon by the petitioner remained unrebutted.

**14.** It is pertinent to mention here that the scheme of the Code provides for triggering the insolvency resolution process by three categories of persons namely,

- a) *Financial creditor*
- b) *Operational creditor, and*
- c) *Corporate debtor itself.*

**15.** The procedure in relation to the Initiation of Corporate Insolvency Resolution Process by the “Financial Creditor” is delineated under Section 7 of the Code, wherein only “Financial Creditor” / “Financial Creditors” can file an application. As per Section 7(1) of the Code an application could be maintained by a Financial Creditor either by itself or jointly with other Financial Creditors. Section 7 of the Code thus mandates that only the applicant “Financial Creditor” has to prove the default. In other words, even if there is a clear default, the application under Section 7 of the Code is

not maintainable in case the applicant is not a financial creditor. Therefore, in order to maintain the present application filed under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process in respect of respondent corporate debtor, the present applicant has to satisfy that she comes within the definition of “*Financial Creditors*”.

**16.** The expressions “Financial Creditor” and “Financial debt” have been defined in Section 5 (7) and 5 (8) of the Code respectively, which are reproduced below.

*“5. In this part, unless the context otherwise requires, -*

.....

*(7) "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;*

*(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—*



- a) *money borrowed against the payment of interest;*
- b) *any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*
- c) *any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- d) *the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- e) *receivables sold or discounted other than any receivables sold on non-recourse basis;*
- f) *any amount raised under any other transaction, including any forward sale or purchase agreement, having the effect of a borrowing;*

Explanation – For the purposes of this sub-clause-

- (I) Any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and
- (II) The expressions, “allottee” and real estate project shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016)
- g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- h) any counter - indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other

*instrument issued by a bank or financial institution;*

*i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) and (h) of this clause.” (emphasis given)*

**17.** Clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy (Second Amendment) Act, 2018 with effect from 6<sup>th</sup> June, 2018. In view of the explanation inserted in the revised definition, it has been abundantly made clear that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and thus will come within the definition of ‘Financial Debt’ under the Code. Definition of ‘Financial Debt’ has been amended to remove any cloud and to specifically include dues of the home buyers. Amendment Act leaves no doubt that home buyers are “Financial Creditors”. Accordingly, allottees/home buyers being “Financial Creditors” in terms of Explanation to Section 5 (8) (c) of the Code, can initiate Corporate Insolvency



Resolution Process against the defaulting builder or developer.

**18.** Hon'ble Supreme Court in the case of *Pioneer Urban Land and Infrastructure Limited & anr. Vs. Union of India & Ors.* reported in 2019 SCC Online SC 1005 decided on 09.08.2019 has held as follows:

*“We, therefore, hold that allottees/home buyers were included in the main provision, i.e. Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.*

**Conclusion**

- i. The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6), or 300-A of the Constitution of India.*
- ii. The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position*

*to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.*

*iii. Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law.” (Emphasis given)*

**19.** In view of the proposition of law settled by the Hon’ble Supreme Court, allottees/home buyers are to be regarded as financial creditors in terms of Section 5(8)(f) of the Code. Hon’ble Supreme Court has further made it clear that the allottees/home buyers can avail the remedies available under the provisions of the Code.

**20.** In the present case the petitioner had booked a flat on payment booking amount. The various dates of disbursement of the said disbursed amount including the details of flat have been furnished in the application. The Allotment Agreement dated 22.05.2016 executed with the petitioner has been placed on record. Petitioner has also placed on record copies



of cheques and receipts given by the respondent; in support of the disbursement of the amount to the respondent corporate debtor.

**21.** Since the amount has been raised from the petitioner/allottee under a real estate project, petitioner being allottee/home buyer is regarded as a financial creditor in terms of Section 5(8)(f) of the Code. Petitioner gave advance to the real estate developer and thereby financed the real estate project at hand. Money that is disbursed is no longer with the allottee, but is with the real estate developer who is legally obliged to give money's equivalent back to the allottee. Not only the debt has a commercial effect of borrowings and come within the scope of 'financial debt' but also the petitioner clearly comes within the definition of 'financial creditor'.

**22.** As a sequel to the aforesaid discussions the petitioner being a financial creditor can invoke Corporate Insolvency Resolution Process under Section 7 of the code against the respondent corporate debtor in case of default in repayment of the financial debt.

**23.** Initiation of Corporate Insolvency Resolution Process by Financial Creditor is regulated by the provision engrafted in Section 7 of I&B Code, which reads as under:

**“7. Initiation of corporate insolvency resolution process by financial creditor. —**

(1) *A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

*Explanation. — For the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*

(2) *The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.*

(3) *The financial creditor shall, along with the application furnish—*

(a) *record of the default recorded with the information utility or such other record or evidence of default as may be specified;*

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board. (4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

(5) Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary -6- Company Appeal (AT) (Insolvency) No. 428 of 2018 proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

**Provided** that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), give a notice to the applicant to rectify the defect in his application within seven

*days of receipt of such notice from the Adjudicating Authority.*

*(6) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).*

*(7) The Adjudicating Authority shall communicate—*

*(a) the order under clause (a) of sub-section (5) to the financial creditor and the corporate debtor;*

*(b) the order under clause (b) of sub-section (5) to the financial creditor, within seven days of admission or rejection of such application, as the case may be.”*

**24.** Dealing with the ambit and scope of Section 7 of the Code in the case of “Innovative Industries Ltd. Vs. ICICI Bank and Ors.” reported in (2018)1 SCC 407, the Hon’ble Supreme Court has observed as under:

*“28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor - it need not be a debt owed to the applicant financial creditor. Under*



*Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is*



*important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under subsection (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.”*



**25.** The present application under Section 7 of the Code for initiation of Corporate Resolution Insolvency Process has been filed by petitioner financial creditor in Form-1 in terms of Rule 4 of Insolvency and Bankruptcy (application to Adjudicating Authority) Rules, 2016 accompanied with required information, documents and records as prescribed under the Rules.

**26.** The petitioner has proposed the name of Mr. Akarsh Kashyap, for appointment as Interim Resolution Professional having registration number IBBI /IPA-001 /IP-P00566 /2017-18/ 11042, resident of D-3, LGF, Lajpat Nagar Part-1, New Delhi-110024 with email-id akashyap2002@yahoo.com. Mr. Akarsh Kashyap has agreed to accept the appointment as the interim resolution professional and has signed a communication in FORM 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. There is a declaration made by him that no disciplinary proceeding is pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by Mr. Akarsh Kashyap as per the requirement of the IBBI

Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

**27.** It is reiterated that the Form-1 filed in the present case under Section 7 of the Code read with Rule 4 of the Rules, shows that the Form is complete in all respect and there is no infirmity in the same. It is further seen that no disciplinary proceeding is pending against the proposed IRP.

**28.** The next question comes for consideration is whether respondent corporate debtor has committed default in payment of the financial debt.

**29.** In this regard it is seen that the applicant has placed copy of cheques along with receipt issued by the respondent company to establish disbursement of Rs. 4,50,000/- to the respondent company. There was execution of Apartment Buyers Agreement between the parties and allotment agreement in favor of the applicant which has been placed on record. There are photographs on record to prove the contention of the applicant that the construction on the project site has stopped. The applicant has also claimed that the respondent has not contacted nor made any communication with the applicant. The applicant further

alleged that although more than 3 years have passed neither the flat was constructed nor applicant's money was refunded despite demand. It is reiterated that the respondent has neither filed any counter nor placed any document to rebut the claim of the applicant.

**30.** In the facts and as per available records, it appears that the respondent corporate debtor has committed default in repayment of the financial debt. The application under Section 7 is maintainable once the default is more than the threshold limit of one lac. Once there is a debt and default and the application is complete the Adjudicating Authority is bound to admit the application preferred under Section 7 of the Code.

**31.** As a sequel to the aforesaid discussion it is seen that the applicant being the home buyer comes within the definition of Financial Creditor. The material placed on record further confirms that applicant financial creditor had disbursed the money to the respondent corporate debtor as consideration for purchase of flat. However, the respondent failed to construct the flat nor returned the debt disbursed by the applicant. It is accordingly reiterated that respondent

corporate debtor has committed default in repayment of the outstanding financial debt which exceeds much above the statutory limit of rupees one Lakh. Besides it is also seen that the application filed in Form – I under Section 7 of the Code read with Rule 4 of the Rules is complete and there is no infirmity in the same. Moreover, the material on record reveals that there is no disciplinary proceeding pending against the proposed IRP. It is thus seen that all the requirements of Section 7 (5) (a) of the Code stand fulfilled.

**32.** As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

**33.** Mr. Akarsh Kashyap, having registration number IBBI /IPA-001 /IP-P00566 /2017-18/ 110042, resident of D-3, LGF, Lajpat Nagar Part-1, New Delhi-110024 with email-id akashyap2002@yahoo.com is appointed as an Interim Resolution Professional.

**34.** We direct the applicant Financial Creditors to deposit a sum of Rs. 2 Lacs with the Interim Resolution Professional namely Mr. Akarsh Kashyap to meet out the expenses to perform the functions assigned to him in accordance with

Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the Financial Creditor. The said amount however be subject to adjustment towards Resolution Process cost as per rules and shall be paid back to the Financial Creditor.

**35.** In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

**36.** We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

*“(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree*



*or order in any court of law, tribunal, arbitration panel or other authority;*

*(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*

*(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*

*(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.”*

**37.** It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and

Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

**38.** The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. It is further made clear that all the personnel connected with the Corporate Debtor, its promoters or any other person associated with the Management of the Corporate Debtor are under legal obligation under Section 19 of the Code to extend every assistance and cooperation to the Interim Resolution Professional as may be required by him in managing the day to day affairs of the 'Corporate Debtor'. In case there is any violation committed by the ex-management or any tainted/illegal transaction by ex-directors or anyone else, the Interim Resolution Professional would be at liberty to make appropriate application to this Tribunal with a prayer for passing an appropriate order. The Interim Resolution

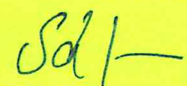


Professional shall be under duty to protect and preserve the value of the property of the 'Corporate Debtor' as a part of its obligation imposed by Section 20 of the Code and perform all his functions strictly in accordance with the provisions of the Code, Rules and Regulations.

- 39.** The office is directed to communicate a copy of the order to the Financial Creditor, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCT of Delhi & Haryana at the earliest possible but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified to the public at large.



**(M.M. KUMAR)  
PRESIDENT**



**(S. K. MOHAPATRA)  
MEMBER (T)**